

KENNETH J. WANLESS

IBIA 74-6-A

Decided September 20, 1973

Appeal from the decision of the Area Director, Bureau of Indian Appeals, affirming the decision of the Superintendent, Rosebud Agency, terminating a revocable permit to use certain submarginal lands for grazing purposes.

Affirmed as Modified.

APPEARANCES: Kenneth J. Wanless, pro se.

OPINION BY MR. SABAGH

The United States Government owned certain "submarginal" lands on the Rosebud Reservation, Rosebud, South Dakota. Pursuant to a Revocable Permit dated March 26, 1965, the Rosebud Sioux Tribe was granted permission to use and occupy it for the benefit of the Tribe. This right to use is for an indefinite period subject to termination at the discretion of the Government. By provisions contained in the permit, the Tribe is authorized to transfer, by revocable permit, such use rights as was granted to them. Such permits are revocable in the discretion of the Superintendent, Bureau of Indian Affairs, Rosebud Agency.

On May 25, 1971, the appellant filed a proposal with the Tribe to use 160 acres of submarginal land identified as "Antelope Tract #67" and described as the SW1/4 of Sec. 5, T. 39 N., R. 28 W., Sixth Principal Meridian, Todd County, South Dakota, for a period of five years to begin on March 1, 1972, at an annual rental of \$250.00. The revocable agreement was executed by the Tribe and the appellant and was approved by the Superintendent, Rosebud Indian Agency on November 17, 1971.

The appellant was required to put up a performance bond at the cost of \$400; to pay a yearly Tribal tax of \$11.20; and, use rental for the land in the amount of \$250 per year.

On August 24, 1972, Eliza Thin Elk, filed a proposal with the Tribe for a permit to use the identical land (Antelope Tract #67) being used by the appellant. The Executive Committee of the Tribe on September 18, 1972, unanimously approved the revocation of the

appellant's permit and issuance of a use permit to Eliza Thin Elk. The Tribe notified the Superintendent, Rosebud Agency, of the action taken by its Executive Committee on September 20, 1972. The Superintendent, notified the Area Director, Aberdeen Area Office of the Executive Committee's action by letter of September 28, 1972.

The Acting Superintendent, Rosebud Agency, issued a letter decision on March 7, 1973, notifying the appellant of the Tribal Council's unanimous vote to terminate his permit effective February 28, 1973, in favor of a member of the Tribe, and of the Bureau of Indian Affairs plans to terminate the appellant's permit, effective April 10, 1973. An appeal was timely filed and the Acting Area Director, Aberdeen, by letter decision of March 23, 1973, affirmed the decision of the Acting Superintendent.

In his decision of March 23, 1973, the Acting Area Director, gave as his reasons for sustaining the Superintendent the following:

The above land is a portion of the "submarginal" land owned by the government. The Rosebud Sioux Tribe has been granted permission to use and occupy the so-called "submarginal" land located on the Rosebud Reservation for the benefit of the Rosebud Sioux Tribe. This right to use is for an indefinite period and may be terminated at the discretion of the government.

The Rosebud Sioux Tribe by provisions contained in their permit, may transfer, by revocable permits, such use rights as are granted to them. These revocable permits are not a lease and are not to be taken or construed as granting any leasehold interest or right in or to the land, and are revocable in the discretion of the Superintendent, Rosebud Agency.

The document in question is a permit, revocable for breach of any of its terms and conditions or (penultimate paragraph) "at the discretion of the Superintendent, Rosebud Indian Agency, Rosebud, South Dakota." Thus it gives the permittee no legal assurance of continuity of tenure.

The Rosebud Sioux Tribe has taken action to permit a member of the Tribe to use the land, therefore the action of the Acting Superintendent in terminating your permit, on the above described property is affirmed.

Mr. Wanless appealed the decision of the Acting Area Director to the Secretary of the Interior and the matter was referred to this Board pursuant to a special delegation.

It appears after an examination of the record in this matter that the issues to be resolved are twofold. They are: (1) can the

Bureau of Indian Affairs revoke a "Revocable Permit" at its discretion, and (2) when does revocation become effective or take effect? We maintain that the answers are contained in the "Revocable Permit" itself. Consequently, let us turn now to the permit and to the provisions we consider to be pertinent.

Provision No. 26, reads as follows:

Leases on tribal lands managed by the Tribal Land Enterprise will be canceled in the event such land is assigned to members of the Rosebud Sioux Tribe during the term of the lease. Such cancellation will be automatic and will not require the consent of the contracting parties. In the event such land is assigned to a member of the Tribe the lease on the land will be canceled at the end of the lease year in which the assignment is made. (Emphasis added).

A special provision included on the penultimate page of the permit reads as follows:

It is further understood and agreed that this instrument is not a lease and is not to be taken or construed as granting any leasehold interest or right in or to the land described herein, but is merely a temporary permit, terminable and revocable in the discretion of the Superintendent, Rosebud Agency at any time, and in any event not to extend beyond February 28, 1977.

It is noted that the word 'lease' is used on numerous occasions in the agreement. For the purpose of this decision we conclude the word 'permit' was intended where the word 'lease' appears.

It is clear from an examination of the special provision referred to supra, that the Bureau of Indian Affairs does have the discretion to revoke a revocable permit.

It is equally clear from an examination of provision No. 26, that where land is assigned to a member of the Tribe the permit on the land will be canceled at the end of the permit year in which the assignment is made.

Consequently, we conclude that the Bureau of Indian Affairs did have the discretion to revoke a revocable permit at the end of the permit year, which in this case we find would be the last day of February 1974.

In passing we unanimously agree that had the Bureau not been dilatory in the issuance of its decision to terminate appellant's permit to use the land in question, namely, from September 28, 1972, when the Bureau was informed of the Tribal Council decision, to March 7, 1973, the date of issuance of the Acting Superintendent's

decision to terminate appellant's permit, the permit would have terminated on February 28, 1973.

We note appellant's reasons for appeal and reject these contentions as being without legal foundation.

Suffice it to say that the appellant was made aware of the nature of the agreement, by the words "Revocable Permit" and by the terms of the agreement, itself. He was free to accept or reject such an agreement. However, once he accepted same, he cannot now cry foul.

NOW THEREFORE, by virtue of the special delegation to the Board of Indian Appeals by the Secretary of the Interior, we AFFIRM the decision of the Acting Area Director, Bureau of Indian Affairs, as modified in the body of the decision, namely, terminating appellant's permit effective on the last day of February, 1974.

Mitchell J. Sabagh

I concur:

David J. McKee, Chairman